OCA 86-1245

OFFICE OF CONGRESSIONAL AFFAIRS

Routing Slip

	ACTION	INFO
1. D/OCA		X
2. DD/Legislation	X	
3. DD/Senate Affairs		
4. Ch/Senate Affairs		
5. DD/House Affairs		
6. Ch/House Affairs		
7. Admin Officer		
8. Executive Officer		X
9. FOIA Officer		
10. Constituent Inquiries Officer		
11.		
12.		

SUSPENSE 8 May 86
Date

STAT

Action Officer:

Remarks:

No objection - comments provided to OMB on 4/25/86.

GJ/ 17 Apr 86
Name/Date

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

April 14, 1986

LEGISLATIVE REFERRAL MEMORANDUM

TO:

Department of Justice
Department of the Treasury
Central Intelligence Agency
Department of Defense

SUBJECT: General Services Administration proposed reports on S. 1667 and H.R. 3378 -- Electronic Communications Privacy Act of 1985.

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with Circular A-19.

Please provide us with your views no later than May 8, 1986.

Direct your questions to Gregory Jones (395-3454), of this office.

James C. Murr for
Assistant Director for
Legislative Reference

Enclosures

cc: John Cooney
David Haun
Karen Wilson
Arnold Donahue

Administrator
General Services Administration
Washington, DC 20405

DRAFT

Dear Mr. Chairman:

The General Services Administration (GSA) wishes to submit its views on S. 1667, the "Electronic Communications Privacy Act of 1985." This bill would substantially amend the statutory restrictions on electronic surveillance that were established under Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. 2510 et seq.).

Title III of the existing law only governs the interception and disclosure of the contents of any "wire or oral communications." This bill would broaden the coverage of Title III to include the interception of any "electronic communications." This bill defines "electronic communications" broadly so as to include any transmission of signs, signals, writings, images, sounds, data or intelligence by wire, radio, electromagnetic or photoelectric systems. Thus, this bill would cover not only eavesdropping on conversations, but interception of any electronic communication or information. While GSA agrees that the electronic surveillance provisions of Title III should be reevaluated to ensure that the statute remains current with changing technology, GSA cannot support S. 1667 as currently drafted. We have three principal objections with this legislation.

First, we oppose section 102(b)(4), which concerns restrictions upon the disclosure of communications records. Section 102(b)(4) would specifically amend section 2516 of Title 18, United States Code by prohibiting a "provider of electronic communication service" from disclosing to the government "a record kept...in the course of providing that communication service and relating to a particular communication made through that service...," in the absence of a court order. Furthermore, this provision would allow the entry of such a court order only in those instances where criminal conduct is

suspected. This provision would preclude the obtaining of telephone toll records by administrative or grand jury subpoena, as is the current practice. Such records, like pen registers, never reveal the contents of a conversation and invade no reasonable expectation of privacy. Indeed, this provision would effectively prevent the Government from exercising routine oversight to detect and prevent abuse and misuse of its own telephone system. We believe that present procedures for securing such information by administrative or grand jury subpoena provide sufficient safeguards against the abuse of this process. Finally, we note that this section uses the terms "governmental authority" and "governmental entity." While the terms appear to have the same meaning, it would be preferable to use only one term for purposes of consistency.

Second, we object to section 103 of this bill, which would amend section 2520(b)(3) Title 18 by allowing the court to award "a reasonable attorney's fee and other litigation costs reasonably incurred" in a civil action brought against any "person or entity" who violated Chapter 119. Since this provision could be interpreted as a waiver of sovereign immunity on the part of the United States, we must oppose its enactment.

Third and most importantly, we strongly oppose enactment of Title II of this legislation. Title II would prohibit any use of a pen register or tracking device other than in an emergency, unless authorized by a court order. This provision would overrule several recent decisions of the Supreme Court in these subject matter areas. For example, in Smith v. Maryland, 442 U.S. 736 (1979), the Court held that the telephone company's installation and use, at police request, of a pen register to record numbers dialed from a suspect's home telephone was not a "search" requiring a warrant under the Fourth Amendment. And in United States v. Knotts, 460 U.S. 276 (1983), the Court held that the placement of a "beeper" device in a container of chloroform later purchased by the defendant did not require a warrant. The Courts of Appeals are in conflict as to whether or not a warrant is required to install such a device in or on property owned by a suspect, such as an automobile. The Supreme Court has yet to resolve this issue.

We believe that, insofar as pen registers and tracking devices are concerned, existing constitutional law adequately protects any rights of privacy involved. Accordingly, we strongly oppose Title II of this legislation.

The Office of Management and Budget has advised that, from the standpoint of the administration's program, there is no objection to the submission of these comments to your Committee.

With best wishes.

Sincerely

Terence C. Golden

The Honorable
Strom Thurmond
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20515